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NO. 49719-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

HUGO RUIZ,

Appellant.

APPELLANT'S REPLY BRIEF

Kristen V. Murray, WSBA No. 36008
Attorney for Appellant

HART JARVIS MURRAY CHANG PLLC
155 NE 100th Street, Ste. 210
Seattle, WA 98125
(206) 735-7474
kmurray@hjmc-law.com

TABLE OF CONTENTS

I. ARGUMENT 1

 A. THE RECORD BEFORE THIS COURT ESTABLISHES MR. RUIZ WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL1

 i. Mr. Ruiz was denied effective assistance of counsel when trial counsel agreed to join the separate cases involving RCZ and PCZ.....2

 ii. Trial counsel’s failure to move for severance during trial constituted ineffective assistance of counsel.....4

 B. HAD TRIAL COUNSEL MOVED FOR SEVERANCE OF COUNTS, THE MOTION WOULD LIKELY HAVE BEEN GRANTED7

 i. The strength of the State’s evidence on each count.....8

 ii. The clarity of defenses as to each count.....9

 iii. Court instructions to the jury to consider each count separately..... 10

 iv. Cross-admissibility of counts.....11

 v. Prejudice was not outweighed by judicial economy.....14

 vi. Severance was necessary in this case.....15

C. THERE WAS A REASONABLE PROBABILITY THAT
THE OUTCOME WOULD HAVE BEEN DIFFERENT HAD
THE COUNTS BEEN SEVERED.....15

II. CONCLUSION..... 17

TABLE OF AUTHORITIES

CASES

<i>Drew v. United States</i> , 331 F.2d 85 (D.C. Cir. 1964).....	10, 11
<i>In re Pers. Restraint of Stenson</i> , 142 Wn.2d 710, 16 P.3d 1 (2001).....	3
<i>State v. Bennett</i> , 36 Wn. App. 176, 672 P.2d 772 (1983).....	14
<i>State v. Bluford</i> , 188 Wn.2d 298, 393 P.3d 1219 (2017).....	8, 14
<i>State v. Bythrow</i> , 114 Wn.2d 713, 790 P.2d 154 (1990).....	7, 10, 11
<i>State v. Contreras</i> , 92 Wn. App. 307, 966 P.2d 915 (1998).....	1
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	12
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	17
<i>State v. Harris</i> , 36 Wn. App. 746, 677 P.2d 202 (1984).....	8, 9, 10, 11, 13
<i>State v. Hernandez</i> , 58 Wn. App. 793, 794 P.2d 1327 (1990).....	9
<i>State v. Horton</i> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	3
<i>State v. Kyлло</i> , 166 Wn. 2d 856, 215 P.3d 177 (2009).....	1, 3
<i>State v. Lopez</i> , 107 Wn. App. 270, 27 P.3d 237 (2001).....	6
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	12
<i>State v. MacDonald</i> , 122 Wn. App. 804, 95 P.3d 1248 (2004).....	9
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	1, 2
<i>State v. Piche</i> , 71 Wn.2d 583, 430 P.2d 522 (1967).....	3
<i>State v. Ramirez</i> , 46 Wn. App. 223, 730 P.2d 98 (1987).....	8, 9, 11, 12, 17

<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	2
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	8, 9, 14
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982).....	13, 14
<i>State v. Saunders</i> , 91 Wn. App. 575, 958 P.2d 364 (1998).....	3
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P. 2d 951 (1986).....	14
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	6, 7, 10, 13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984).....	
.....	1, 2, 16, 17

STATUTES AND OTHER AUTHORITIES

CrR 4.4	4
ER 404(b).....	11, 12
RPC 1.2	3

I. ARGUMENT

A. THE RECORD BEFORE THIS COURT ESTABLISHES MR. RUIZ WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A claim of ineffective assistance of counsel may be considered for the first time on appeal because it is an issue of constitutional magnitude. *State v. Kylo*, 166 Wn. 2d 856, 862, 215 P.3d 177 (2009). “[W]hen an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.” *State v. Contreras*, 92 Wn. App. 307, 313, 966 P.2d 915 (1998).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). “Deficient performance is performance falling ‘below an objective standard of reasonableness based on consideration of all the circumstances.’” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)

(quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). “There is a strong presumption that defense counsel’s conduct is not deficient. However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The fundamental fairness of the proceeding must be the focus of the inquiry. *Strickland v. Washington*, 466 U.S. 668, 696, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

i. Mr. Ruiz was denied effective assistance of counsel when trial counsel agreed to join the separate cases involving RCZ and PCZ.

The Respondent asserts in its briefing, “[T]here is a wide array of substantial reasons why a defendant would be inclined to agree to a prejudicial joinder.” Brief of Respondent, p. 11. In support of this assertion, the respondent poses two considerations that could form a basis for agreeing to joinder – sentencing considerations and the desire for the defendant to avoid testifying in two separate trials. Brief of Respondent, p. 11; 14-15. However, there is no support in the record for the Respondent’s speculative argument. Rather, the record shows defense counsel agreed to joinder based on a mistaken belief that the two cases would be cross-admissible. “Yes, Mr. Ruiz has agreed to join the cases. It makes sense, and the evidence probably would have come in under 404(b) regardless.”

RP 3. As will be discussed further, *infra*, the evidence would not have been cross-admissible in separate trials. Trial counsel's failure to object to the State's motion to join was deficient because it was based on an incorrect understanding of the law regarding the cross-admissibility of the different sexual assault allegations. Trial counsel's failure to properly execute a trial strategy may constitute ineffective assistance of counsel. *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003). This includes the failure to object to the admissibility of impermissible evidence. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The Respondent notes in its argument that Mr. Ruiz agreed to join the cases. Brief of Respondent, p. 16; RP 3. However, the decision whether to agree to joinder ultimately rests with defense counsel. RPC 1.2. "For many reasons, therefore, the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 735, 16 P.3d 1 (2001) (quoting *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)).

ii. Trial counsel's failure to move for severance during trial constituted ineffective assistance of counsel.

The Respondent also argues, "It is entirely reasonable for a lawyer to agree to joinder of offenses pretrial, then to wait and see how the evidence turns out at trial. No prejudice resulted from defendant's counsel's agreement to joinder because the issue remained open in the trial." Brief of Respondent, p. 9. Assuming, *arguendo*, defense counsel took a wait and see approach as suggested by the Respondent, the failure to move for severance once the testimony unfolded constituted deficient performance¹.

During trial, defense counsel did not execute any sort of strategy demonstrating it was a tactical decision to try the cases together. Joinder of the cases did not further the defense theory of the case. The defense could easily have pursued its theory of the case in separate trials.

The defense theory was that Mr. Ruiz never molested either girl. Mr. Ruiz denied the allegations of both RCZ and PCZ. RP 811-12. During trial, the defense used different theories to challenge the girls' allegations.

¹Because the extent of prejudice resulting from joinder of offenses may not be apparent until trial unfolds, CrR 4.4 provides that a motion to sever may be made during trial. "A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require." CrR 4.4(a)(1).

During cross-examination of RCZ, defense counsel focused on her inconsistent statements, her recantation and her animosity towards Mr. Ruiz. RP 443-52; 458-59. Defense also focused on PCZ inconsistent statements. RP 515; 519. However, during cross-examination, defense counsel elicited that PCZ had been sexually abused by her uncle. RP 511-14. Defense then put forth a theory that PCZ was mistaken when she said Mr. Ruiz abused her and incorrectly interpreted innocent touches as wrong. RP 515-519. Lastly, defense counsel elicited PCZ was in trouble with her mother when she made her disclosure and suggested this as a possible motive for the false allegation. RP 511-13. All these challenges to RCZ and PCZ's allegations could have been pursued in separate trials.

Further, joinder of the cases into one trial allowed the State to emphasize the allegations against Mr. Ruiz were brought by two different victims. “[Bricia] calls the police because [PCZ] had been being . . . sexually abused by Mr. Ruiz. Same type of allegation that her other daughter had made so many years ago.” RP 873. The State also argued the girls’ testimony when taken together showed they were credible. “If these two children colluded to make this story up, would their descriptions of what happened to them not be the exact same?” RP 875-76. “But one of the things that they have been most consistent about is that he was sexually

abusing them.” RP 880. The State used the testimony of RCZ to show why PCZ delayed disclosure.

[PCZ] saw what [RCZ] went through. *** After [RCZ] disclosed the first time and just got steamrolled by her family, why in the world would [PCZ] say anything, especially when her mother, the mother who’s supposed to protect them, brings him back into the home.

RP 879. Finally, because the cases were tried together, the State was able to argue Mr. Ruiz engaged in a pattern of behavior towards the two victims.

Instead, ladies and gentlemen, what’s more likely the truth . . . is that this is the defendant’s M.O. for sexually gratifying himself with young children, that both children were subjected to dry humping by him. That’s how he uses children to sexually gratify himself. That, ladies and gentlemen, is reasonable based upon these two girls’ testimony.

RP 876. “[W]here no possible advantage could flow to the defendant, and counsel’s actions cannot be attributed to ‘improvident trial strategy or misguided tactics,’ representation is deficient.” *State v. Lopez*, 107 Wn. App. 270, 277, 27 P.3d 237 (2001).

In *State v. Sutherby*, the Washington Supreme Court found defense counsel’s failure to seek severance of charges constituted ineffective assistance of counsel. *State v. Sutherby*, 165 Wn.2d 870, 883-84, 204 P.3d 916 (2009).

Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. The joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature. In this context there is a recognized danger of prejudice to the defendant even if the jury is properly instructed to consider the crimes separately.

Id. at 884. (Internal citations omitted). As in *Sutherby*, the record in this case reveals no legitimate strategic or tactical reason for counsel's failure to move for severance. Counsel's performance fell below an objective standard of reasonableness. No reasonable argument can be made that allowing all counts to be tried together could have furthered Mr. Ruiz's interests. Counsel's failure to move for severance was clearly detrimental to the defense.

B. HAD TRIAL COUNSEL MOVED FOR SEVERANCE OF COUNTS, THE MOTION WOULD LIKELY HAVE BEEN GRANTED.

"Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). A court must consider four factors when determining whether severance is required to avoid prejudice to a defense. *State v. Sutherby*, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009). The four factors are: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to

consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994); *State v. Bluford*, 188 Wn.2d 298, 393 P.3d 1219 (2017). Each factor is considered separately, because the absence of even one mitigating factor may require separate trials. *State v. Ramirez*, 46 Wn. App. 223, 228, 730 P.2d 98 (1987) (prejudice not mitigated because one factor absent, abuse of discretion not to sever); *State v. Harris*, 36 Wn. App. 746, 752, 677 P.2d 202 (1984).

i. The strength of the State’s evidence on each count.

During trial, the evidence the State presented to support its charge that Mr. Ruiz molested PCZ was significantly weaker than the charged counts involving RCZ. This was evident from the State’s dismissal of two of the three counts involving PCZ prior to closing arguments. “[PCZ] struggled during her testimony. I think it was obvious . . . and that’s the reason why two of the counts have ultimately been lowered down and dismissed.” RP 741-43.

There was no physical evidence presented showing Mr. Ruiz committed sexual assaults against either RCZ or PCZ. There were no eyewitnesses who corroborated the testimony of RCZ or PCZ. Neither girl testified she saw the charged abuse perpetrated on the other. The entirety of the State’s case was based on the word of the two alleged victims.

Washington courts have held that severance should be granted when the State's evidence on one count is strong and weak on another. *State v. Hernandez*, 58 Wn. App. 793, 794 P.2d 1327 (1990). The Washington Supreme Court has reasoned severance avoids conviction on the weaker count merely because of strong evidence on a different charge. *State v. Russell*, 125 Wn.2d 24, 64, 882 P.2d 747 (1994). In *State v. MacDonald*, this Court analyzed whether two separate counts of rape involving different victims should be severed and held the defendant should have separate trials for the two charges.

[N]one of the evidence in one case supports the other. *** The strength of the State's evidence in L.P.'s case is weak and will become weaker with the necessary disclosure of the impeaching evidence. When one case is remarkably stronger than the other, severance is proper.

State v. MacDonald, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004).

ii. The clarity of defenses as to each count.

With respect to the second factor, the record shows the defense for all counts was the same – general denial. While conflicting defenses increase the prejudice flowing from a joint trial, incompatible defenses are not a requirement for severance. For instance, although denial was the defense for two counts of indecent liberties, it was nevertheless an abuse of discretion not to sever the charges in *State v. Ramirez*, 46 Wn. App. 223, 225-26, 730 P.2d 98 (1987). Similarly, in *State v. Harris*, the court reversed

for failure to sever where the defense to both rape charges was consent. *State v. Harris*, 36 Wn. App. 746, 748-49, 677 P.2d 202 (1984).

iii. Court instructions to the jury to consider each count separately.

The third factor relates to whether the jury can be instructed to consider each count separately. Under this factor, the trial court should: (1) instruct the jury that evidence of each count is to be considered for that count only, and (2) consider the extent to which the jury could be expected to compartmentalize such evidence across the different charges. *State v. Bythrow*, 114 Wn.2d 713, 721, 790 P.2d 154 (1990). However, in the context of alleged sexual crimes, there is a recognized danger of prejudice to the defendant even if the jury is properly instructed to consider the crimes separately. *State v. Sutherby*, 165 Wn.2d 870, 883-83, 204 P.3d 916 (2009) (internal citations omitted). Because of the type of allegations in this case, the concerns raised in *Drew v. United States* were present here.

The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.

Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964); *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984); *State v. Ramirez*, 46 Wn. App. 223, 228, 730 P.2d 98 (1986).

iv. Cross-admissibility of counts.

The evidence in this case was not cross-admissible under ER 404(b). Courts have found lack of cross-admissibility in cases involving sexual offenses creates a strong likelihood of prejudice thereby warranting severance. *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). Accordingly, this factor would have weighed heavily towards severance and likely would have resulted in the trial court granting the motion had it been raised by defense counsel.

In *State v. Ramirez*, the court held it was error to deny severance in a case involving two counts of indecent liberties with different victims because “proof of one count could not have been adduced at a separate trial for the other[.]” *State v. Ramirez*, 46 Wn. App. 223, 228, 730 P.2d 98 (1986). Notably, the *Ramirez* court found severance was required despite the jury’s acquittal on one of the two counts. “[D]espite the acquittal on count one, the jury may have used the evidence presented to prove count one to infer a criminal disposition on the part of Ramirez, from which was found his guilt of count two.” *Id.* Here, as in *Ramirez*, evidence of RCZ’s

allegations against Mr. Ruiz would not have been admissible to prove PCZ's allegations in a separate trial.

The defense was denial. Accordingly, the State was not required to rebut a claim of accident or mistake because no such claim was asserted by the defense. "Evidence of other misconduct that the State offers to prove absence of mistake or accident must directly negate such a defense." *State v. Ramirez*, 46 Wn. App. 223, 228, 730 P.2d 98 (1986). Additionally, evidence regarding the allegations of RCZ and PCZ was not cross-admissible to show common scheme or plan. To be admissible as a common scheme or plan the State must establish a sufficiently high-level of similarity between the prior bad act and the current charge:

To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan to which the charged crime and the prior misconduct are the individual manifestations.

State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). The need for a high degree of similarity was reaffirmed in *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). "We emphasize that the degree of similarity for the admission of evidence of a common scheme or plan must be substantial." *Id.* at 20.

The allegations made by RCZ and PCZ were not similar enough to be cross-admissible under ER 404(b). RCZ initially made her allegations in 2011. CP 4-5. PCZ did not make her allegations until 2015 – four years after RCZ’s allegations. CP 5. While both girls alleged Mr. Ruiz touched them in their bedroom, the conduct allegedly occurred at different times. RP 432-35; RP 500-506. Other allegations of the girls differed. RCZ alleged Mr. Ruiz touched her outside by their garage. RP 428-32. PCZ alleged Mr. Ruiz touched her in a car and his bedroom. RP 492-95; 496-98. RCZ recanted her allegations. CP 5; RP 437-38. PCZ did not. As the court found in *State v. Harris*:

[I]t is obvious the two rapes here do not qualify as links in a chain forming a common design, scheme or plan. At most they show only a propensity, proclivity, predisposition or inclination to commit rape. Such evidence is explicitly prohibited by ER 404(b).

State v. Harris, 36 Wn. App. 746, 751, 677 P.2d 202 (1984).

Appellate courts have “cautioned about the admissibility of other sex crimes, warning that ‘[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.’” *State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009). “[A]n intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.” *State v. Saltarelli*, 98

Wn.2d 358, 363, 655 P.2d 697 (1982). Where admissibility is a close call, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” *State v. Smith*, 106 Wn.2d 772, 776, 725 P. 2d 951 (1986) (quoting *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

v. Prejudice was not outweighed by judicial economy.

The final step in the analysis requires the trial court to weigh the prejudice against the need for judicial economy. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). When evidence is not cross-admissible, “the interest in judicial economy loses much of its force because the State would not have been required (or allowed) to call all of its witnesses in each separate trial.” *State v. Bluford*, 188 Wn.2d 298, 315-16, 393 P.3d 1219 (2017). In this case, judicial economy was not significantly furthered by a joint trial. The allegations of RCZ and PCZ were distinct and their testimony could easily have been divided between separate trials.

The girls would not have been permitted to testify in the trial involving the other’s allegation as the evidence was not cross-admissible. Neither testified they witnessed the charged abuse perpetrated upon the other by Mr. Ruiz. The testimony of Jose Sanchez Figueroa and Detective Bourbon only related to the charges involving PCZ. Elizabeth Nyland, Detective Yglesias, and Officer Quinn’s testimony was only relevant to

RCZ. Likewise, Keri Arnold did not interview PCZ and her testimony, therefore, was only relevant in a trial for RCZ. The only witnesses who *may* have testified during the State's case for both allegations were Bricia Chavez, the girls' mother, and Joanne Mettler, the nurse practitioner. Judicial economy is not significantly furthered by a consolidated trial in this case.

vi. Severance was necessary in this case.

After considering all the relevant factors, the trial court likely would have granted the motion if defense counsel had moved for severance in this case. Evidence on the counts involving PCZ was significantly weaker than the evidence on the counts involving RCZ and the cases were not cross-admissible. Additionally, there is a recognized danger of prejudice in cases involving allegations of sexual misconduct even if the jury is properly instructed to consider the crimes separately. Lastly, the prejudice of a joint trial was not outweighed by judicial economy.

C. THERE WAS A REASONABLE PROBABILITY THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT HAD THE COUNTS BEEN SEVERED.

Mr. Ruiz's right to a fair trial was adversely affected by his trial counsel's deficient performance. It undermined the confidence in the outcome of his trial. The prejudice to Mr. Ruiz is evident from the record.

“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Strickland v. Washington*, 466 U.S. 668, 695, 104 S.Ct. 2052 (1984). Here, the outcome would have been different had the trials been severed particularly given the weakness of the evidence on the counts involving PCZ. The State essentially conceded the weakness in the evidence by dismissing two of the three counts involving PCZ prior to closing arguments. At the very least, there is a reasonable probability that Mr. Ruiz would have been acquitted of the counts involving PCZ. “[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Id.* at 696.

Further, if the cases had been severed and separate trials required, the State could not have argued a pattern of deviant behavior as it did in its closing during the consolidated trial. RP 876. Nor could the State have used RCZ’s testimony to explain PCZ’s delayed disclosure. RP 879. Finally, the State would not have been able to emphasize to the jury the fact that Mr. Ruiz faced allegations from two different victims. “[T]he jury may well have cumulated the evidence of the crimes charged and found guilt, when

if the evidence had been considered separately, it may not have so found.”

State v. Ramirez, 46 Wn. App. 223, 228, 730 P.2d 98 (1986).

Mr. Ruiz has met his burden of showing a reasonable probability that the result of the proceeding would have been different but for counsel’s deficient performance.

An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

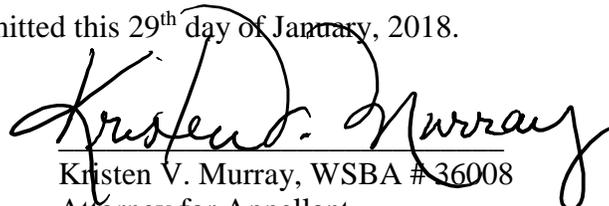
A reasonable probability is a probability sufficient to undermine the confidence in the outcome.”

Id. at 694; *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

II. CONCLUSION

Mr. Ruiz respectfully requests this Court reverse his convictions and remand his case for a new trial.

Respectfully submitted this 29th day of January, 2018.


Kristen V. Murray, WSBA #36008
Attorney for Appellant

DECLARATION OF SERVICE

I hereby declare that on January 29, 2018, I filed the Appellant's Brief via Electronic Filing for the Court of Appeals for Division II and delivered via E-mail the same to:

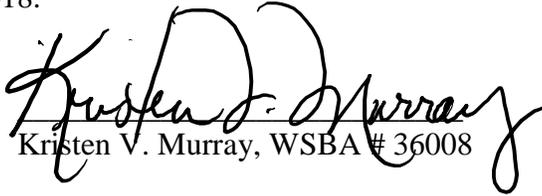
Mr. Mark von Wahlde
Pierce County Prosecutor's Office
930 Tacoma Avenue S, Rm 946
Tacoma, WA 98402-2102
mvonwah@co.pierce.wa.us
PCpatcef@co.pierce.wa.us

I further declare that I delivered via United States Postal Service the same to:

Mr. Hugo Ruiz
6719 207th Street CT E
Spanaway, WA 98387

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated January 29, 2018.


Kristen V. Murray, WSBA # 36008

HART JARVIS MURRAY CHANG PLLC

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